

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

77-5013

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DOCKET NO. 77-5013

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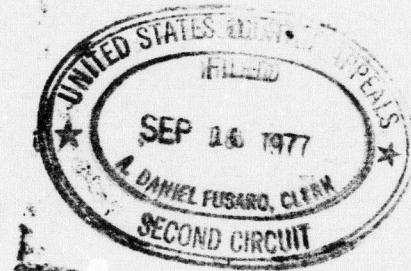
THE BOHACK CORPORATION,

Plaintiff-Appellee,

v.

TRUCK DRIVERS LOCAL UNION NO. 807,
INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, et al.,

Defendant-Appellants.



DEFENDANT-APPELLANT'S, TRUCK DRIVERS
LOCAL UNION NO. 807, INTERNATIONAL
BROTHERHOOD OF TEAMSTERS, BRIEF

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PRELIMINARY STATEMENT

On August 9, 1976 this Court remanded an order of the United States District Court, Eastern District of New York, dated November 19, 1975, for the determination of the following issues by Bankruptcy Referee C. Albert Parente:^{1/}

"(1) whether to affirm the contract, or whether the debtor has so conformed to the contract as to make it binding, See In re Public Ledger, Inc., 161 F.2d 762, 767 (3rd Cir. 1947), cited with approval in REA Express, Inc., supra. 523 F.2d at 170; (2) whether to grant the debtor's petition to reject the agreement as onerous, adhering to our admonition in Kevin Steel to 'move cautiously in allowing rejection of a collective bargaining agreement,' 519 F.2d at 707; and (3) whether to order arbitration under its terms in any event, and on what issues." [Emphasis added].

Unbeknown to this Court on August 9, 1976, Bankruptcy Referee Parente had entered an order on May 19, 1976 rejecting the labor agreement (Agreement) between The Bohack Corporation (Bohack) and Truck Drivers Local Union No. 807, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Local 807). The term of the Agreement was from July 1, 1973, through March 31, 1976. A Notice of Appeal was duly

^{1/} Truck Drivers Local 807 v. Bohack Corp., 541 F.2d 312 (2d Cir. 1976).

filed by Local 807, however, argument of that appeal before Chief Judge Mishler of the Eastern District Court was deferred until Bankruptcy Referee Parente had determined whether to order arbitration of the grievances between Bohack and Local 807.

On October 15, 1976 Bankruptcy Referee Parente signed an order directing Local 807 to submit its grievances with the debtor-in-possession "to arbitration, in accordance with the procedure set forth in Section 26 of the Bankruptcy Act, to determine if [the debtor-in-possession] breached said collective bargaining agreement and to render a finding on damages, if necessary." Bankruptcy Referee Parente signed a second order on October 21, 1976 which set forth additional issues to be submitted to arbitration. Those issues are:

a. The extent of damages to be recovered by the discharged employees upon the rejection of the [Agreement].

b. The amount and extent of pension, health insurance, welfare, vacation benefits and the value of seniority of each employee effected by said rejection of the [Agreement].

c. The amount of the mitigation of such damages by reason of the subsequent employment of each employee or the receipt of unemployment insurance paid to said employee.

d. The issue of whether or not the [Agreement] rejected by the Employer should be specifically enforced by the reinstatement of each employee notwithstanding the fact that the [Agreement] has expired.

The October 21, 1976 order also provided: (1) "that all issues determined by the arbitrators be subject to the further order of [the Bankruptcy Court], as to the status, amount and validity of such arbitrator's award"; and (2) "that the arbitrator shall proceed in accordance with the procedures set forth in Section 26, 11 U.S.C. Section 49."

On October 26, 1976 Bohack filed its Notice of Appeal and on October 28, 1976 Local 807 filed its Notice of Appeal from the October 15 and 21, 1976 orders. On November 19, 1976 Bankruptcy Referee Parente signed an order amending his October 15 and 21, 1976 orders to provide for a stay of arbitration pending the appeal of said orders to the District Court.

On April 21, 1977 Chief Judge Mishler issued his Memorandum of Decision on said Appeals. The District Court (1) affirmed the Bankruptcy Referee's rejection of the Agreement, (2) modified the October 21, 1976 order directing arbitration^{2/} and (3) reversed and vacated the October 15, 1976 order. Arbitration of the grievances, Judge Mishler found, should be in accordance with the grievance procedure set forth in the Agreement^{3/}

^{2/} The October 21, 1976 order was affirmed insofar as it directed arbitration on the issues involving damages to the Bohack truck drivers resulting from the rejection of the Agreement; otherwise the order was reversed.

^{3/} The District Court rejected the Bankruptcy Referee's decision that the arbitration be governed by §26 of the Bankruptcy Act. However, the District Court decision, in footnote 6, stated that if the parties to the dispute don't agree upon the proper grievance tribunal, "the bankruptcy court will have to determine the appropriate committee for arbitration."

and that the Bankruptcy Court's review of the arbitration award is limited to determining the priority and status of the award as a matter of bankruptcy law.

On May 10, 1977 Local 807 duly filed its Notice of Appeal from the order of Chief Judge Mishler, dated May 8, 1977, which was in accordance with his Memorandum of Decision. On May 18, 1977 Bohack filed its Notice of Appeal from that May 8, 1977 order.^{4/}

^{4/} On July 15, 1977 Bankruptcy Referee Parente ordered Bohack to commence the sale of its remaining assets. The sale of those assets has taken place while Bohack continues in the status of a debtor-in-possession.

STATEMENT OF ISSUES

1. Did the debtor-in-possession become a party to the Agreement by expressly assuming or implicitly adopting its terms.

2. Has Bohack satisfied its obligation of proving that the Agreement was onerous and burdensome.

3. May a bankruptcy court reject a labor agreement subsequent to its normal termination date.

4. Should Local 807's authorized grievances be submitted to the Committee.

STATEMENT OF FACTS

On July 30, 1974 Bohack filed a petition under Chapter XI of the Bankruptcy Act, 11 U.S.C. 701 et seq. An order issued on that day which allowed Bohack to continue business operations, then including approximately 140 retail supermarkets, as a debtor-in-possession. Bohack's retail supermarkets were in Brooklyn, Queens, Nassau and Suffolk Counties. They also had a warehouse and distribution terminal at 45-25 Metropolitan Avenue in Brooklyn (Bohack Square). Local 852, I.B.T. represented the warehousemen in the produce, grocery and dairy warehouses at Bohack Square. The meat and delicatessen warehouse employees were covered by a labor agreement between Bohack and Local 174 of the Amalgamated Butchers of North America (357a).

Local 807 represented only the truck drivers employed by Bohack. That collective bargaining relationship between Bohack and Local 807 existed for over thirty (30) years prior to the Chapter XI proceeding. The Local 807 drivers made all the deliveries of meat, produce, dairy, delicatessen and bakery to Bohack's stores. The tractors and trailers used by these drivers were owned by Truck Fleets of New York, Inc. (Truck Fleets) and leased to Bohack (432a). Truck Fleets was a wholly owned subsidiary of Bohack and Bohack was the only source of business for it (432a-433a).

For approximately three months prior to Bohack's Chapter XI petition the Local 807 drivers were being assigned by Bohack's management to pick-up some groceries from Bozzuto's Inc. (Bozzuto), a grocery wholesaler in Cheshire, Connecticut (365a). The Local 807 drivers would pick up a load of groceries in Cheshire and return it to Bohack Square where they would be unloaded into the grocery warehouse (377a-378a).

During the period between July 30, 1974 and December 15, 1974 Bohack's delivery operations continued unchanged from what they had been prior to the Chapter XI petition, including continuing to employ the same 120 Local 807 drivers. On December 16, 1974 Bohack closed its produce, dairy and bakery warehouses and began receiving that merchandise for its stores from Shopwell, Inc. (Shopwell), a wholesaler in the Bronx, New York. Approximately sixty (60) of Bohack's drivers lost their jobs as a result of Bohack's transfer of this delivery work to Shopwell drivers (120a). On December 16, 1974 Truck Fleets leased approximately 32 tractors and 44 trailers to Shopwell and Shopwell drivers started making those deliveries to the Bohack stores (434a).

During January 1975 Bohack discontinued warehousing all groceries and, thereafter, Bohack's drivers went to both Bozzuto's warehouse and the wholesale warehouse of Filigree Foods, Inc. (Filigree) in Totowa, New Jersey, to pick up all

Bohack's groceries and deliver them to the Bohack stores (358a, 377a-378a). These loads from Bozzuto and Filigree were brought back to Bohack Square. The trailers were dropped in the parking area and delivered to the Bohack stores by the same or other Bohack drivers on the following day.

During May, 1975 Bohack no longer could obtain groceries from Filigree because it too had filed a Chapter XI petition. The grocery volume that had been received from Filigree was split between Bozzuto and Krasdale Foods, Inc. (Krasdale). The groceries received from Krasdale were delivered to the Bohack stores by non-Bohack employees (378a-379a). That portion of the Filigree volume that was transferred to Bozzuto continued to be delivered by Bohack drivers from Cheshire to the retail stores.

The December 16, 1974 Bohack decision to discontinue employing its drivers to deliver produce, dairy and bread to its supermarkets had a substantial impact upon the number of jobs available for Bohack drivers. Approximately 60 drivers were laid off as a result of this single change in operations (120a). On that same day Local 807 filed a grievance, with the New York City Joint Area Local Committee (Committee), against Bohack alleging that Bohack's failure to employ its Local 807 drivers to make those deliveries was a breach of the Agreement (11a). The May, 1975 discon-

tinuance of the pick-ups and delivers from Filigree and the performance of that work by non-Bohack employees assigned by Krasdale caused a further reduction to employment for Bohack drivers.

The December 16, 1974 grievance was filed with the Committee pursuant to Article 45, Section 1 of the Agreement, which states that the Committee has jurisdiction over disputes and grievances in accordance with the procedure established in Article 46 (41a).^{5/}

The Committee rendered its award on May 16, 1975, which instructed Bohack to "cease and desist forthwith from having its bargaining unit work subcontracted out" (56a).

Bohack disregarded the mandate of the Committee's award. It altered its grocery agreement with Bozzuto in early June, 1975 to the extent that Bohack drivers no longer went to Cheshire, Connecticut to pick up the groceries. Bozzuto drivers delivered the groceries to Bohack Square and Bohack drivers delivered the loads to the supermarkets. This change in operations by Bohack caused a further reduction in the driver's seniority list and their work

^{5/} Article 46, Section 1 provides that grievances, involving "any controversy which might arise," that are not adjusted between the parties to the Agreement are to be submitted to the Committee for settlement (42a).

opportunity (383a).

On or about May 27, 1975 Local 807 moved to confirm the Committee's May 16, 1975 award in a proceeding instituted in the Supreme Court of the State of New York, County of Queens. On or about June 5, 1975 Bohack removed that proceeding to the Eastern District Court.^{6/}

On June 17, 1975 Local 807 filed a grievance with the Committee alleging the damages sustained by Bohack's drivers as a result of Bohack's failure to comply with the May 16 award (57a). A hearing on that grievance has never been held.^{7/}

Thereafter, Local 807 notified Bohack that it intended to take immediate economic recourse if its conduct in violation of the Agreement did not cease (65a-66a).^{8/} Regardless of this warning Bohack made arrangements to

^{6/} This Court affirmed the refusal of the District Court to confirm the May 16, 1975 award because the bankruptcy court did not authorize the parties to submit the dispute to arbitration in accordance with Rule 919(b) of the Bankruptcy Rules. Truck Drivers Local 807 v. Bohack, 541 F. 2d 312 (2d Circuit 1976)

^{7/} Initially Bohack requested and was granted postponements. Then when Bankruptcy Referee Parente issued his temporary restraining order, on June 30, 1976, the propriety of such a proceeding was put into doubt. That doubt persists to date.

^{8/} Also Article 46, Section 1(i) of the Agreement provides that failure to comply with any final decision of the Committee withdraws the benefits of the no-strike provision of that Article.

receive its meat deliveries at the supermarkets off Truck Fleets tractor-trailers operated by Shopwell employees. At the time that Local 807 became aware that these arrangements were being made there were only 32 drivers employed by Bohack from the 120 that had been regularly employed up to December 16, 1974.

On June 30, 1975 Local 807 commenced peaceful picketing at Bohack Square and at certain of Bohack's retail stores. On that same day Bohack sought and obtained a temporary restraining order against Local 807's picketing from Bankruptcy Referee Parente. On July 16, 1975 Judge Parente granted Bohack a preliminary injunction. On July 18, 1975 Bohack moved, by order to show cause, to have Judge Parente reject the Agreement (59a-62a). Also, on that day, Bohack notified its remaining 32 drivers that they were terminated (73a). On Monday, July 21, 1975 Bozzuto drivers began delivering groceries directly from Cheshire, Connecticut to Bohack's retail stores and Shopwell drivers started delivering meat to Bohack's stores directly from Shopwell's warehouse (383a, 386a). Thus, between December 16, 1974 and July 18, 1975 Bohack systematically breached the Agreement and its obligations to 120 employees. After July 18, 1975 Bohack received all of its deliveries at the stores on Truck Fleets equipment, bearing the marking of Bohack, and operated

by Buzzuto and Shopwell driver.^{9/}

On July 24, 1975 Local 807 commenced a Section 301 action, 29 U.S.C. Section 185, in the Eastern District Court to compel arbitration of the grievances resulting from Bohack's actions on and after July 18, 1975 (67a). On August 1, 1975 Bohack served and filed its answer and counterclaim to Local 807's action to compel arbitration (72a-76a). In its answer and counterclaim (paragraphs 12 and 19) Bohack expressed a willingness to submit these disputes to arbitration upon permission being granted by Judge Parente (74a-75a). Bohack also, on August 1, 1975, sought specific performance of the Agreement in its application for a temporary restraining order against Local 807 (78a-79a).^{10/}

For the services performed by its drivers during the period between April 1, 1973 and July 18, 1975 Bohack

^{9/} During September 1975 Bohack discontinued using Shopwell's truck drivers for the delivery of produce, meat, dairy and bakery. From September 1975 until May 1976 these deliveries were being made by employees of Hills Supermarkets, Inc. (Hills) from its warehouse in Brentwood, Long Island. These deliveries continued to be made on Truck Fleets equipment. During May 1976 Bohack resumed its relationship with Shopwell and discontinued using Hills drivers.

^{10/} That temporary restraining order was signed by Chief Judge Mishler on November 19, 1975. It "restrained and enjoined (Local 807) from conducting a strike, walkout, or work stoppage or establishing a picket line at (Bohack's) various places of business or at the premises of any other party of person doing business with (Bohack)."
This order was vacated by this Court in Truck Drivers Local 807 v. Bohack

(as debtor and debtor-in-possession) complied with the economic terms and conditions of the Agreement. The wage rates were paid, dues were checked-off and remitted, paid vacations were received, seniority was recognized, health and pension contributions were paid and both Bohack and Local 807 participated in grievance discussions and proceedings (255a, 346a-347a). With termination the drivers lost their seniority, their health and pension coverage, as well as all their other negotiated benefits set forth in the Agreement (335a).

On May 28, 1976 Judge Parente adjudged that the Agreement's terms constituted an onerous burden to Bohack "and a peril to its rehabilitation efforts." (113a, 106a). In his orders of October 15 and 21, 1976 Bankruptcy Judge Parente set forth the issues to be decided by arbitration and the bankruptcy procedure to be followed by Bohack-Local 807 in selecting the arbitrator (114a, 115a-116a).

On April 21, 1977, Chief Judge Mishler rendered his Memorandum of Decision ^{11/} (137a), which affirmed the rejection of the Agreement, and so much of the October 21 order that directs arbitration of:

- a) The extent of damages to be recovered by the discharged employees upon the rejection of the labor contract between Bohack and Local 807.

11/ Judge Mishler's order was dated May 4, 1977 (150a-151a).

b) The amount and extent of pension, health insurance, welfare, vacation benefits and the value of seniority of each employee effected by said rejection of the employment contract.

c) The amount of mitigation of such damage by the reason of the subsequent employment of each employee or the receipt of unemployment insurance paid to said employee.

The remainder of Judge Parente's October 21, 1976 order was reversed by Judge Mishler. The District Court's order directed that the arbitration procedure should be in accordance with the Agreement's procedure and not that set forth in Section 26 of the Bankruptcy Act. ^{12/} Chief Judge

12/ Chief Judge Mishler, in footnote 6 of his Memorandum of Decision, does not direct Bohack and Local 807 to submit their dispute to the Committee (149a). However, he did acknowledge that Local 807 had withdrawn its allegation that Bohack had violated Article 32 of the Agreement. The issue that Judge Parente ordered to be submitted to the arbitrator in his October 15, 1976 order was:

"Whether truck deliveries of produce, groceries, dairy, meat and bakery products to the Bohack stores for the period between December 16, 1974 and March 31, 1976 by persons other than truck drivers employed by the debtor-in-possession violated the (Agreement) i.e., Article 40 Section 4(a); Article 50, Section 2 and paragraph 2 of the rider thereto."

Dispite Judge Parente's limitation of the dispute to allegations against Bohack that are within the New Jersey-New York Area General Trucking Supplement section of the Agreement (37a-55a) and the clear instruction of Article 45 Section 1 and 46 Section 1 of the Agreement (41a-44a), Chief Judge Mishler held that if Bohack disagrees with submitting the dispute to the grievance forum provided in the Agreement that "the bankruptcy court will have to determine the appropriate committee for arbitration." (149a).

Mishler also reversed and vacated Bankruptcy Referee Parente's October 15, 1976 order.

ARGUMENT

POINT I

THE DEBTOR-IN-POSSESSION BECAME A PARTY TO THE AGREEMENT BY IMPLICITLY ADOPTING ITS TERMS

Within the Second Circuit there is no question that during the life of a collective bargaining agreement it is an "executory contract", and to accomplish the rejuvenation of a financially troubled business the debtor-in-possession may obtain a rejection of that agreement under Section 313(1) of the Bankruptcy Act, 11 U.S.C. Section 713(1).^{13/} However, where the debtor's business is continued by the debtor-in-possession the burden is upon it to take immediate action to reject any labor agreement between the bargaining representatives for the debtor's employees and the debtor. By continuing the same employees without changing the terms of their employment, the debtor-in-possession is deemed to have assumed their collective bargaining agreements and the debtor-in-possession cannot later reject it. In re Public Ledger, Inc. 161 F 2d 762 (3d Cir. 1947), cited with approval in Brotherhood of Railway, Airline and Steamship Clerks, etc. v. R.E.A. Express,

^{13/} Shopmen's Local Union No. 455, et al., and NLRB v. Kevin Steel Products, Inc., 519 F 2d 698 (2d Cir. 1975)

Inc., 523 F 2d 164 (2d Cir. 1975).

In Public Ledger the employer filed its petition under Chapter X of the Bankruptcy Act, 11 U.S.C. Section 501 et seq. on November 7, 1941. The bankruptcy court ordered the trustees to continue the operations of the business until January 5, 1942, when the court ordered its discontinuance. All wages earned during the period between November 7, 1941 - January 5, 1942 (excluding vacation and severance claims) were paid by the trustees.

The union contracts executed by the bankrupt provided for vacation with pay and a severance benefit. The trustees denied the vacation and severance claims contending that the bankrupt's labor agreements had never been assumed by them, and upon the further ground that the labor agreements could not be legally assumed without the specific authorization of the bankruptcy court. The claims were disallowed by the bankruptcy court and the district court affirmed. The Third Circuit reversed.

The evidence clearly showed that the trustee chose to keep the bankrupt's employees at work under the terms of the bankrupt's labor agreements. Furthermore, the trustees obtained the employees services with full knowledge that those services were being provided under the terms of the bankrupt's labor agreements. In response to the trustees' argument that the bankruptcy court did not "authorize or intend to authorize assumption of the" labor agreements, the Third Circuit said:

"We think the inference unjustified. It is quite evident that the Court expected that a workable plan for reorganization was possible of adoption within a short period of time, and, of course it knew that labor tranquility was necessary. The court knew, too, that good labor conditions under the contract constituted a valuable asset, and a necessary one to any possible reorganization or sale of the Ledger as a going concern. It is unreasonable to assume that the court contemplated anything but the continuance of the labor contract as the basis for continued services of the employees."

The Third Circuit found little difference between a trustee's expressly assuming a labor agreement or merely knowingly conforming to its terms. Their finding was that:

"The trustees could not seek and accept the benefits of the employment under the favorable terms of the contract without for the time of enjoying them, accepting and yielding to terms deemed burdensome."

In the Kevin Steel, REA Express, Inc. and Bohack cases this Court "reasoned that the status of the debtor-employer is, in some respects, analogous to that of a successor employer so far as an existing collective bargaining agreement is concerned, insofar as the debtor is a 'new judicial entity.' "^{14/} The Supreme Court recognized in NLRB v. Burns International Security Services, 406 U.S. 272 (1972)

^{14/} Local 807 v. The Bohack Corporation, at p.320.

that debtors-in-possession will often find it advantageous to observe the debtor's labor agreement, rather than to face uncertainty and turmoil. The Supreme Court also speculated that the National Labor Relations Board (Board) might properly find in certain circumstances that the successor has assumed the obligations of the debtor's contract.^{15/} 406 U.S. at 291.

The Board has found that a successor employer, by its conduct consented to be bound by its predecessor's labor agreement and ordered the successor to comply with the existing contract. Eklund's Sweden House Inn, 203 NLRB 413 (1973) and Ethan Allan, Inc. 216 NLRB 208; enf'd in mat. part., 544 F 2d 742 (4th Cir., 1976), in Eklund the employer purchased a motel complete with a restaurant and lounge. The motel operations continued unchanged. The restaurant and bar was closed. The sale contract specifically provided that the union contract which had been ratified four months before was not being assigned or assumed by the purchaser. The seller's manager, who was retained by the purchaser, told the union that there would be no change with respect to the contract. He also said the dues check-off would continue and that dues had already been deducted for next month. The new owner informed the union that it should direct questions about the sale to his manager. Later when the union asked about its

^{15/} One of the circumstances enumerated by the Supreme Court was a reorganization proceeding.

failure to receive the check-off they were directed to the new owner's attorney and were informed by him that his client would not honor the contract and that the dues check-off would end. At another meeting with the attorney, management rights and no-strike clauses were proposed.

The Board found that the new owner provided the same motel service with the same personnel in the same jobs and the Board found that there was no change in the employing industry. This led to the conclusion that the employer was a successor. The Board held that the new employer violated its duty to bargain by announcing new wages and benefits without consultation with the union. The early conduct of the employer was found to indicate his consent to be bound by the contract even though the purchase agreement contained a nonassumption clause.

In Ethan Allen a furniture manufacturer temporarily leased (with conditional agreement to purchase) supplier's plant, following default by supplier on certain bank loans, and operated it for six weeks. Thereafter, there was a short shutdown. The manufacturer then purchased the plant from the bank at a foreclosure sale. It reopened the plant with just over half of the number employed on the shutdown date and with all operations other than traditional supply functions having been terminated.

Because it directed and paid plant employees and supervisors, continued predecessor's operations basically intact, and honored the terms of the labor agreement during the leasing period, the Board concluded that the manufacturer was a successor to its supplier's bargaining obligation and had adopted by conduct the predecessor's labor agreement for the balance of its term. The Fourth Circuit enforced the Board's order "because there was enough evidence of recognition of the union contract's existence and continuance[during the six week period] to support the Board's finding that there had been an adoption...of the contract."^{16/}

Bohack filed its petition under Chapter XI of the Bankruptcy Act, 11 U.S.C. 701 et seq., on July 30, 1974. From the court appointment of the debtor-in-possession until July 18, 1975 (more than 11½ months) the debtor-in-possession employed all the debtor's drivers,^{17/} paid the Agreement's wage rates, recognized the drivers seniority with the debtor for employment and fringe benefit purposes, deducted Local 807's dues in accordance with the Agreement's check-off provisions, contributed health and pension contributions on behalf of the

^{16/} NLRB v. Pine Valley Div. of Ethan Allan, Inc., 544 F 2d 742 (4th Cir.1976). Although neither of these Board decisions involve an employer in reorganization they are worthy of considerable attention for the time and conduct factors applied by the Board and the Fourth Circuit in finding that a successor employer is bound by its predecessor's labor agreement.

^{17/} This number was originally 120. It was reduced to 60 on December 16, 1974 and to 32 during May, 1975.

drivers to the Local 807 Labor-Management Health and Pension Funds and engaged in grievance proceedings with Local 807 representatives (255a, 346a-347a). In addition, Bohack's total operations carried on without a break following the filing of its Chapter XI petition with the same management and supervisory personnel. (356a).

The debtor-in-possession may not be the same legal entity as the debtor, but it can, by its conduct, so conform "to the contract as to make it binding."^{18/} During each of the proceedings and appeals that Bohack and Local 807 have instituted, since June 30, 1975, no issue has been raised questioning Bohack's application of the Agreement's economic terms and conditions during the June 30, 1974-July 18, 1975 period.^{19/} In fact, on August 1, 1975, Bohack served and filed a counterclaim seeking specific performance of the Agreement (72a). By its conduct, since filing the Chapter XI petition, it is evident that Bohack elected to assume the Agreement and receive the benefit of the drivers' services rather than to face the uncertainty and turmoil that might have followed if it sought to renegotiate its terms and conditions following the filing of the Chapter XI petition. Having elected to make the debtor's contract its own, the debtor-in-possession is bound to the Agreement, just as if

^{18/} Truck Drivers Local Union No. 807 v. The Bohack Corporation, 541 F 2d 312 at 321 (2d Cir. 1976).

^{19/} Local 807's contention is that (1) Bohack has breached the Agreement by the change of its delivery operations to the stores on and after December 16, 1974 and (2) that the Committee should hear the authorized disputes and either affirm or deny Local 807's contention.

it had been made by the debtor-in-possession in the first instance.^{20/}

The assumption of an executory contract may be shown by acts or oral statements of a trustee or debtor-in-possession as well as by formal written declaration. Nostromo, Inc. v. Fahrenkrog, 288 F 2d 82 (8 Cir. 1968). See also: In re Forgee Metal Products, Inc., 229 F 2d 799 (3 Cir. 1956), and In re McCormick Lumber and Mfg. Corp., 144 F. Supp. 807 (D. Or. 1956).

POINT II

BOHACK HAS NOT SATISFIED
ITS BURDEN OF PROVING THAT
THE AGREEMENT WAS ONEROUS

When a debtor-in-possession rejects an executory contract, this operates as a breach of that contract and entitles the other party to prove a claim for damages and satisfy it as a general creditor in the confirmation proceeding.^{21/} When a collective bargaining agreement is rejected what is includable in these damages is uncertain. However, regardless of what is included, participation as a general creditor does

^{20/} American Anthracite and Bituminous Coal Corp. v. Leonardo Arrevabene, S.A., et al 280 F 2d 119, 124 (2d Cir. 1960).

^{21/} 4A Collier Section 70.43[9].

not adequately protect employees' interests. This Court has recognized the impact that rejection of a labor agreement has on employee interests and has put bankruptcy courts on notice that they "must scrutinize with particular care petitions to reject collective bargaining agreements."^{22/} The record in this case, and an accommodation of the Bankruptcy Act and the National Labor Relations Act,^{23/} requires denial of Bohack's petition to reject the agreement.

Subsequent to the filing of the Chapter XI petition, Bohack and Shopwell entered into an agreement whereby Shopwell would provide all the merchandise sold by it to Bohack F.O.B. the Shopwell warehouse.^{24/} Yet, Bohack laid off 60 of its own drivers and had Truck Fleets lease 32 tractors and 44 trailers to Shopwell for making these deliveries to Bohack stores. Why would Shopwell enter into an agreement to provide Bohack merchandise, F.O.B. its warehouse, if Shopwell was concerned about its labor relations with the union repre-

^{22/} Shopmen's Local Union No. 455, et al. v. Kevin Steel Products, Inc., supra at 706.

^{23/} 29 U.S.C. 141 et seq.

^{24/} Defendant's Exhibit B (467a)

25/
senting its warehousemen and drivers? Isn't it more reasonable that Shopwell would have demanded a through rate for delivery to Bohack stores if it were concerned about union problems. These pick-ups were not for deliveries going to Shopwell stores, but to Bohack stores; it couldn't cause any harm to the Shopwell employees.

Bohack took advantage of Local 807's legal inability 26/
to take immediate and effective economic action against Bohack. Having succeeded with the Shopwell venture Bohack applied the same tactics when it transferred grocery deliveries to Krasdale, meat to Shopwell, both meat and produce to Hills 27/ and groceries

25/ Defendant's Exhibit A-a (372a)

26/ If Local 807 took economic action the debtor-in-possession would have sought and obtained injunctive relief. Boys Markets, Inc. v. Retail Clerks Union, Local 770, 398 U.S. 235 (1970). Local 807 filed for immediate relief under the Agreement's grievance procedure and has only now obtained authorization to proceed to arbitration. Even following their commencement of a proceeding to reject the Agreement Bohack sought and obtained specific performance of the no-strike provision in the Agreement (73a).

27/ Hills bargaining position was extremely weak. They needed the debtor-in-possession's volume in their warehouse in order to avoid Chapter XI itself. Hills came to Bohack and offered to supply the debtor-in-possession with meat, produce and groceries. When the debtor-in-possession transferred from Hills back to Shopwell in May, 1976 Hills filed Chapter XI and terminated its warehouse operation (291a, 395a-396a).

to Bozzuto.^{28/} Bohack's clear objective was to use the bankruptcy proceeding as an anvil to forge an avenue of escape from its Agreement and its truck drivers, without regard of the impact that such maneuvering had upon its employees.^{29/}

Local 807 sought only to continue making deliveries to the debtor-in-possession's stores. The debtor-in-possession's drivers made such deliveries from Bohack Square and from warehouses of wholesale suppliers prior and subsequent to the bankruptcy petition. Binder, interestingly enough, testified that there was no substantial difference between the transportation costs from utilizing its own drivers and those incurred when deliveries were made by employees or agents of its wholesale suppliers.^{30/} What Bohack did was to seize upon this opportunity to "permanently" rid itself of 120 drivers, whom it considered unnecessary following the discontinuance of its warehouse operation. This was at the expense of their drivers employment, health and pension coverage, as well as causing anguish and deprivation to the drivers' families.

^{28/} The Executive Vice President of Bohack, Joseph Binder, testified that the Bozzuto deliveries could not be continued to Bohack Square because of a foreclosure proceeding. He failed to say that that proceeding had been stayed and that the debtor-in-possession continued to hold title to that property during May, 1976. (339a-340a).

^{29/} Teamsters Local 886 v. Quick Charge, Inc., 168 F 2d 513, 515-16 (10 Cir. 1948), In re Mamie Conti Gowns, Inc., 12 F Supp. 478, 480 (S.D.N.Y. 1935).

^{30/} 280a, 288a, 294a, 329a.

The debtor-in-possession has not satisfied the standards suggested by the Second Circuit in Kevin Steel. On the contrary, the record quite clearly shows that the only purpose for this rejection proceeding is to prevent the drivers from receiving priority status, as an administration claim, for the damages they sustained as a result of Bohack's breach of the Agreement.^{31/} This is not justifiable cause of a debtor-in-possession to seek rejection of the Agreement. On the contrary, it supports Local 807's contention that the debtor-in-possession took advantage of its rights under the contract from June 30, 1974 through July 18, 1975 and then sought to shed itself of the liability that its prior conduct produced.^{32/} This cannot be done.

When a debtor-in-possession assumes a labor agreement, meritorious employee claims are entitled to priority as a "cost and expense of administration" under Section 64(a)(1) of the Bankruptcy Act, 11 U.S.C. 104(a)(1). In re Public Ledger, supra at 769-71. Compare McCloskey v. Division of Labor Law Enforcement, 200 F. 2d 402 (9 Cir. 1952); In re Men's Clothing Code Authority, 71 F. Supp. 469 (S.D.N.Y. 1937). Although by its terms section 64 applied to straight bankruptcies, the Bankruptcy Act provides elsewhere that Section 64 governs Chapter XI arrangements. 11 U.S.C. Section 702.

^{31/} 313a-319a

^{32/} In re Klaber Bros., 173 F. Supp. 83 (S.D.N.Y. 1959).

Since the debtor-in-possession is a separate legal entity, carrying on the business for the benefit of the prefilings creditors, fairness requires that claims incident to the debtor-in-possession's operation of the business be paid before those of creditors, for whose benefit the continued operation of the business was allowed. See Reading Co. v. Brown, 391 U.S. 471 at 478, 88 St. Ct. 1759, 20 L. Ed. 2d 751 (1968). The First Circuit has stated In re Mammoth Mart, Inc., 536 F. 2d 950 (1 Cir. 1976):

"When third parties are induced to supply goods or services to the debtor-in-possession pursuant to a contract that has not been rejected, the purposes of Section 64(a)(1) plainly require that the claims be afforded priority."

POINT III

THE AGREEMENT COULD NOT BE REJECTED AFTER ITS NORMAL TERMINATION DATE

The Agreement's designated expiration date was March 31, 1976. As long as any part of the Agreement remained unperformed it was executory; however, following its termination date the Agreement is not subject to the bankruptcy court's power under Section 313(1) of the Bankruptcy Act, 11 U.S.C. Section 713(L).^{33/}

^{33/} Collective bargaining agreements are "executory" only for their unexpired terms. Railroad Clerks v. REA, 523 F. 2d at 169.

POINT IV

LOCAL 807 AUTHORIZED GRIEVANCES
SHOULD BE SUBMITTED TO THE
COMMITTEE

Chief Judge Mishler in his April 21, 1977 Memorandum of Decision agreed with Local 807 that the Agreement controls the question of the grievance procedure to be followed to resolve authorized disputes.^{34/} However, he did not decide the issue of which grievance tribunal, under the Agreement had jurisdiction to hear those disputes. Footnote 6 of Judge Mishler's Decision states that if Bohack disagrees with Local 807's view that these disputes should be submitted to the Committee, then "the bankruptcy court will have to determine the appropriate committee for arbitration." (149a).^{35/} Judge Mishler's procedure for the selection of the grievance forum is misplaced.

^{34/} In this Circuit the agreement to arbitrate survives (1) the filing of a bankruptcy petition, Tobin v. Plein, 301 F. 2d 378 (2d Cir. 1962), (2) the expiration of the collective bargaining agreement, Nolde Brothers, Inc. v. Local 358, Bakery & Confectionery Workers, 430 U.S. 290 (1977) and (3) the rejection of a labor agreement Truck Drivers Local Union No. 807, I.B.T. v. The Bohack Corp., 541 F. 2d 312 (2d Cir. 1976).

^{35/} Bohack has already refused to submit any authorized dispute to the Committee. On September 28, 1976 Stanley Shaw, Esq. so stated to Judge Parente at the hearing to determine if arbitration should be authorized:

The Court: I support your position, Mr. Mangan but I cannot control the other side to agree. Obviously he has some objection to the [Committee].

Mr. Shaw: Yes, I do, Your Honor.

The issue is not whether Bohack presently agrees with Local 807 on a grievance forum. It is which forum the Agreement designates as having jurisdiction of these disputes. In the proceeding to confirm the May 16, 1975 award Bohack argued that the Committee lacked jurisdiction to resolve that dispute because Local 807 alleged and the Committee found a violation of Article 32, Section 1 of the Agreement. ^{36/} This Court found that "the bankruptcy judge had not approved the submission of the dispute to the grievance machinery" so it did not reach the issue of jurisdiction between the committees to hear properly authorized disputes. ^{37/}

^{36/} Article 32, Section 1 provides:

"For the purpose of preserving work and job opportunities for the employees covered by this Agreement, the Employer agrees that no work or services of the kind, nature or type covered by, presently performed, or hereafter assigned to the collective bargaining unit will be subcontracted, transferred, leased, assigned or conveyed in whole or in part to any other plant, person or nonunit employees, unless otherwise provided in this Agreement.

The Employer may subcontract work when all of his regular employees are working, except that in no event shall road work presently performed or runs established during the life of this Agreement be farmed out...."

^{37/} 541 F. 2d at 319.

Bankruptcy Referee Parente's order of October 15, 1976 provides that Local 807 and Bohack should:

"submit the grievances alleging
[Bohack's] violation of Article
40, Section 1(a), Article 50,
Section 1, Rider paragraph 2,
of the Agreement] to arbitration
..." 38/

The Committee is the only grievance tribunal in the Agreement with original jurisdiction to render a decision on any of the authorized issues set forth in both the October 15 and October 21, 1976 orders. 39/

38/ The October 21, 1975 order did not vacate the October 15, 1976 order. Local 807 contends that both orders reflect the issues that the bankruptcy court authorized be submitted to arbitration pursuant to the remand of this Court.

39/ Article 46, Section 2 of the Agreement provides:

"Questions or disputes concerning the interpretation, application or enforcement of the grievance procedure provided in this Agreement shall themselves be deemed arbitrable before the [Committee] subject to appeals procedure set forth in this Article."

The Agreement consists of three sections. Articles 1-39 (15a - 34a) constitute the National Master Freight Agreement ("National Section"). Articles 40-68 (37a - 55a) contain the New Jersey-New York Area General Trucking Supplemental Agreement ("Area Section"). In addition, there is a two page document known as the Local 807 Rider Agreement ("Rider") (63a - 64a). The Agreement's grievance procedures are contained in Articles 8 (22a - 25a) and 46 (42a - 44a). The jurisdiction for each grievance forum referred to in the Agreement is described in either Articles 8, 45 or 46. 40/

The disposition of grievances, other than discharge cases, is referred to in the terminology of "settlement". 41/

40/ The jurisdiction of the National Grievance Committee is set forth in Article 8, Sections 1(a),(b), 2(b), 3 and 4 (22a - 24a); the Committee's is found in Article 45, Section 1 and Article 46, Section 2 (42a, 44a); the Joint Area Committee's is located in Article 45, Section 2 and Article 46, Section 1(c) (41a, 43a); the Eastern Conference Joint Area Committee's is stated in Article 45, Section 3 and Article 46, Section 1(f) (41a, 43a - 44a) and the New York City Trucking Arbitration Authority is set forth in Article 46, Section 1(a) (43a).

41/ Article 45, Section 1 of the Agreement (41a) gives the Committee exclusive jurisdiction over all disputes and grievances involving the signatory parties, except for discharge cases. The New York City Trucking Arbitration Authority has exclusive jurisdiction of all discharge cases involving Local 807 and signatory employers to the Agreement (43a).

If a dispute or grievance is settled by a majority vote of the Committee, its decision is final and binding on Local 807, the employer and any employees involved. ^{42/} However, where a decision of the Committee interprets a provision contained in the Area Section it is automatically reviewed by the Joint Area Committee. ^{43/} The Joint Area Committee may review Committee decisions on its own initiative "to assure clear and uniform understanding of the meaning of all provisions" of the Area Section. ^{44/}

^{42/} Article 46, Section 1(b)(1) of the Agreement (43a) provides:

"Where a [Committee], by majority vote, settles a dispute, no appeal may be taken to the Joint Area Committee. Such decision shall be final and binding on the Local Union, the Employer and any employee(s) involved."

^{43/} Article 46, Section 2(g) of the Agreement (44a) provides:

"It is further agreed that all matters pertaining to the interpretation of this Agreement, as defined in Article 45 of this Agreement, shall automatically be reviewed by the Joint Area Committee and any decision of the [Committee] may be reviewed by the Joint Area Committee on its own initiative at any time if any member thereof has reason to believe such decision could be or is being construed as [an] interpretation of [the] contract as defined in this Agreement."

^{44/} Ibid.

If the Committee deadlocks and cannot settle a grievance or dispute by a majority vote the matter is referred to the Joint Area Committee. ^{45/} By mutual agreement of the parties to the dispute or grievance, which could not be settled by the Committee, it may be referred directly to the Eastern Conference Joint Area Committee and, thereby, bypass the Joint Area Committee. ^{46/} If the Joint Area Committee hears the case and, by a majority vote, settles the dispute, no appeal may be taken to the Eastern Conference Joint Area Committee. ^{47/} The decision is final and binding. If the

^{45/} Article 45, Section 2 of the Agreement (41a) provides:

"The Joint Area Committee, in accordance with the procedures established in Article 46 of this Agreement, shall have jurisdiction over disputes and grievances involving the Employer and Local Unions which cannot be settled by majority vote of the [Committee]."

^{46/} Article 46, Section 1(c) of the Agreement (43a) provides:

"Where a Joint Local Committee is unable to agree or come to a decision on a case, the dispute shall be promptly submitted to the Joint Area Committee. By mutual agreement the parties may waive the Joint Area Committee step and submit any case deadlocked by the [Committee] to the Eastern Conference Joint Area Committee. Such cases as are referred shall include the minutes of the [Committee's] proceedings on the case. Such minutes shall set forth the positions and facts relied on by each party, but each party may appear and present evidence at the hearing before the Joint Area Committee or the Eastern Conference Joint Area Committee."

^{47/} Article 46, Section 1(d) of the Agreement (43a) provides:

"Where the Joint Area Committee, by a majority vote, settles a dispute, no appeal may be taken to the Eastern Conference Joint Area Committee. Such decision shall be final and binding on both parties with no further appeal."

Joint Area Committee deadlocks, at the request of either of the parties involved in the dispute, it will be referred to the Eastern Conference Joint Area Committee. ^{48/} Where the Eastern Conference Joint Area Committee settles a dispute, by a majority vote, it is final and binding. ^{49/} If the case is deadlocked it may, if agreed upon by a majority of that panel, submit the dispute to an umpire for a decision. ^{50/} If the Eastern Conference Joint Area Committee does not submit the deadlocked dispute to an umpire the case is to be referred to the National Grievance

^{48/} Article 46, Section 1(f) of the Agreement (43a - 44a) provides:

"Where the Joint Area Committee is unable to agree or come to a decision on a case, it shall at the request of the Union or the Employer involved, be appealed to the Eastern Conference Joint Area Committee..."

^{49/} Ibid (44a).

^{50/} Article 46, Section 1(h) of the Agreement (44a) provides:

"Deadlocked cases may be submitted to umpire handling if a majority of the Eastern Conference Joint Area Committee determines to submit such matter to an umpire for decision."

Committee. ^{51/} In the event that the case is deadlocked by the National Grievance Committee the no-strike clause of the Agreement ceases to be effective and either party may resort to "all legal and economic recourse." ^{52/}

The only occasion for the National Grievance Committee to make an original record on any matter brought before it is as a condition precedent to a damage action contemplated as a result of a lockout, unauthorized strike etc. during the term of this Agreement. ^{53/} For the National Grievance Committee to review a factual grievance it must go up the appellate ladder. The original record is developed by the Committee. In addition the Committee, Joint Area Committee and Eastern Conference Joint Area Committee must, each, be unable to reach a majority decision. Even so, the only way that this type of case gets to the National

51/ Article 8, Section 1(a) of the Agreement (22a) provides:

"If upon the completion of the grievance procedure of the Supplemental Agreement the matter is deadlocked the case shall be immediately forwarded to both the Employer and Union Secretaries of the National Grievance Committee, together with all pertinent files, evidence, records and committee transcripts."

52/ Article 8, Section 1(b) of the Agreement (22a) provides:

"If the National Grievance Committee is deadlocked on the disposition of the dispute then either party shall be entitled to all lawful economic recourse to support its position in the matter."

53/ Article 8, Section 2(b) of the Agreement (23a-24a).

Grievance Committee is if a majority of the Eastern Conference Joint Area Committee do not agree to submit the dispute to an umpire for decision.

The Agreement also empowers the National Grievance Committee with both direct and certiorari jurisdiction over the interpretation of provisions contained in the National Section.^{54/} A request for a direct interpretation by the

^{54/} Article 8, Section 1(a) and Section 3 of the Agreement(22a-24a). Article 8, Section 1(a) provides:

"Any request for interpretation of the National Master Agreement shall be submitted directly to the Conference Joint Area Committee for the making of a record on the matter, after which it shall be immediately referred to the National Grievance Committee. Such request shall be filed with both the Union and Employer Secretaries of the National Grievance Committee with a complete statement of the matter."

Article 8, Section 3 provides:

"The National Grievance Committee by majority vote may consider and review all questions of interpretation which may arise under the provisions contained in the Master Agreement which are submitted by either the Union Area Director or the designated Employer representative; and shall have the authority to reverse and set aside the majority interpretation of any area, regional, or local grievance committee, if, in its opinion, such interpretation is contrary to the provisions set forth in the Master Agreement, in which case the decision of the National Grievance Committee shall be final and binding."

National Committee of any provision contained in the National Section is submitted directly to the Joint Area Committee. That panel makes the record of the issues, and positions involved and submits the record to the National Grievance Committee for decision.^{55/} The National Grievance Committee may also review interpretations of the National Section made by any area, regional or local grievance committee and has the authority to reverse that interpretation.^{56/} The decision of the National Grievance Committee is final and binding.^{57/}

Although the National Grievance Committee has sole jurisdiction to make final interpretations of the National Section, an interpretation of the National Section can be made by the Committee, Joint Area Committee or Eastern Conference Joint Area Committee. However, any interpretation of the National Section by one of these other tribunals is subject to review and reversal by the National Grievance Committee. On a direct request the record is made by the Joint Area Committee. Where the National Grievance Committee reviews interpretations on the National Section the record is made at the level where the grievance or dispute is "settled" and either the Union Area Director or the designated Employer representatives can submit a request for review to the National Grievance Committee.

^{55/} Supra, note 54.

^{56/} Ibid.

^{57/} Ibid.

Local 807 can file any grievance or dispute with the Committee, 58/ except a discharge case. A majority decision of the Committee is final and binding unless otherwise reviewed and reversed by an appellate tribunal on (1) a question of interpretation of the Agreement or (2) application and/or enforcement of the grievance procedure. With respect to the facts and issues in these authorized disputes the Committee is the only grievance tribunal of original jurisdiction capable of rendering a decision. The other forums referred to in the Agreement are limited to specific appellate review.

58/ Article 46, Section 2 of the Agreement (44a)
See also: Article 7 of the Agreement (22a),
which provides:

"Authorized representatives of the Union may file grievances alleging violation of the Agreement, under local grievance procedure, or as provided herein."

What authority empowers the bankruptcy court to make a final determination of "the appropriate committee for arbitration"? Any judicial inquiry into the arbitration process is pursuant to Section 301 of the National Labor Relations Act, 29 U.S.C. Section 185, which empowers district courts to hear "suits for violation of [collective bargaining] contracts."^{59/} Just as the bankruptcy court does not possess "jurisdiction over labor disputes" it is not empowered to engage in any procedural interpretation of arbitration agreements.^{60/}

^{59/} United Steelworkers v. Warrior & Gulf Navigation Co.,
363 U.S. 574 (1960).

^{60/} Truck Drivers Local 807, I.B.T. v. Bohack Corp., 7
Collier Bankruptcy Cases 485 (E.D.N.Y. 1975).

CONCLUSION

Upon review of the order of the U.S. District Court for the Eastern District of New York, dated May 4, 1977, In the Matter of the Bohack Corporation (Docket No. 74-B-933) this Court should:

A. reverse that portion of the order that affirms the May 19, 1976 order of Bankruptcy Referee Parente, and find (1) that Bohack assumed the Agreement and thereafter could not reject it, or (2) that the Agreement was not proven by Bohack to be onerous upon the estate, or (3) that the Agreement was not subject to Section 313(1) of the Bankruptcy Act on May 19, 1976.

B. reverse that portion of the order that reverses and vacates the order of Bankruptcy Referee Parente dated October 15, 1976.

C. reverse that portion of the order that reverses the bankruptcy court order of October 21, 1976 to the extent that it directs arbitration of "d) The issue of whether or not the contract rejected by the employer should be specifically enforced by the reinstatement of each employee notwithstanding the fact that the contract has expired."

D. reverse that portion of the order that directs the bankruptcy court to determine the appropriate committee to hear the arbitration if the debtor disagrees that the Committee should hear Local 807's authorized grievances.

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